No. 89-417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF NEW JERSEY,

Petitioner,

v.

RICHARD J. BOLTE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The New Jersey Supreme Court's decision in the case sub judice is a well-reasoned application of the relevant case law to the facts of this case. The court's conclusion that no exigent circumstances existed, independent of the hot pursuit, to justify the warrantless entry of respondent's home for minor offenses is consistent with the rationale of *Welsh v. Wisconsin* 466 U.S. 740 (1984), *Warden v. Hayden* 387 U.S. 294 (1967), *U.S. v. Santana* 427 U.S. 38 (1976) and *Payton v. New York* 445 U.S. 573 (1980).

The facts of this case are undisputed and were generally stipulated to in the trial court and before the Appellate Division (Pet. App. A at pp. 2a-3a, & Pet. App. D at pp. 23a-24a).

On April 6, 1987, at 1:40 a.m., Moorestown Police Officer William Liss began to follow an automobile after he noticed the automobile swerving on and off the road. When the automobile signaled a turn, the officer activated his lights and siren. Officer Liss observed the driver look into his mirror, apparently ignoring the presence of the patrol vehicle and continue on. The automobile made four loops of the neighborhood increasing its speed as it proceeded. The speed ranged from 20 m.p.h. to approximately 48 m.p.h. According to Liss, as the speed increased the operation of the vehicle became more erratic.

The automobile finally stopped in the driveway of a private residence. The garage door had been opened automatically. Officer Liss followed the car, and exited his patrol car in the driveway. He entered the garage just as the automatic garage door started to close and respondent exited his vehicle. Respondent

entered his house. Officer Liss asked the respondent to open the door, but respondent continued on his way. Liss followed the respondent into the house and advised him that he was under arrest. Respondent continued to ignore the officer's request and continued to walk through the house. He then ran up the stairs, entered a bedroom and attempted to close the door. Patrolman Liss was able to keep the door from closing and continued to advise respondent that he was under arrest. Respondent began to talk to someone in the bedroom. At this point, Liss left the bedroom door which was then closed and locked. He then let Patrolman Fullerton and Sgt. Pugh of the Moorestown Police Department, to whom he had radioed for back-up, into the residence. When Liss returned to the bedroom the door had been unlocked and he was greeted by respondent's wife. The respondent then came out of the bathroom, was advised he was under arrest, and was handcuffed and taken to the station for processing. He was subsequently charged with numerous motor vehicle and disorderly persons violations.

Respondent filed a suppression motion in the Superior court of New Jersey, Law Division, seeking to invalidate the warrantless in-home arrest. The motion to suppress was denied by the trial court (Pet. App. A 15a-17a).

An interlocutory appeal of the denial of the motion to suppress was filed with the Superior Court of New Jersey, Appellate Division. The appellate division granted leave to appeal, reversed the trial court, and determined that Officer Liss' warrantless intrusion into respondent's home failed to meet the Fourth Amendment standard of reasonableness and that the

officer violated the sanctity of defendant's home without substantial police need. *State v. Bolte* 225 N.J. Super 335, 542 A.2d 494 (App. Div. 1988). (Pet. App. B at pp. 22a).

The State of New Jersey then filed an interlocutory appeal with the New Jersey Supreme Court. The court granted leave to appeal, 113 N.J. 661, 552 A.2d 181 (1988) and subsequently affirmed the judgment of the appellate division, holding that the offenses respondent committed, both individually and in the aggregate, were within the category of "minor" offenses held by the *Welsh* court to be insufficient to establish exigent circumstances justifying a warrantless home entry.

The State of New Jersey now petitions this Court for review of the judgment of the Supreme Court of New Jersey.

REASONS FOR DENYING THE WRIT

THE NEW JERSEY SUPREME COURT'S DECISION BELOW WAS A WELL-REASONED APPLICATION OF THE RELEVANT CASE-LAW TO THE FACTS OF THIS CASE AND ITS CONCLUSION THAT NO EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE WARRANTLESS ENTRY OF RESPONDENT'S HOME FOR "MINOR" OFFENSES IS CORRECT. THEREFORE, THIS COURT SHOULD DENY PETITIONER STATE OF NEW JERSEY'S WRIT OF CERTIORARI

Petitioner, State of New Jersey, seeks this Court's review of unanimous decisions by both the New Jersey Supreme Court in *State v. Bolte* 115 N.J. 579, 560 A.2d 644 (1989),[1] and the Appellate Division of the Superior Court. *State v. Bolte* 225 N.J. Super. 335, 542 A.2d 494 (App. Div. 1988).[2] Petitioner seeks review of these decisions by suggesting, albeit incorrectly, that a conflict in legal authority exists pertaining to whether or not a suspect who commits "minor" offenses in a policeman's presence should be allowed to defeat his arrest by escaping into his residence. Petitioner alludes to *Warden v. Hayden* 387 U.S. 294 (1967) and *U.S. vs. Santana* 427 U.S. 38 (1976) in support of this alleged conflict. Petitioner also asks this Court to reject the logical and consistent evolution of decisions respecting the Fourth Amendment and its protections and to adopt a new analysis based on flawed reasoning regarding warrantless home arrests. Contrary to petitioner's assertion, there is in actuality, only an illusion of conflict

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[1] Justice Stein writing for the court, and joined by Justices Clifford, Handler, Pollock, O'Hearn & Garibaldi. Chief Justice Wilentz did not participate.

[2] Judges Long and Furman.

conjured by the State to attract this Court's attention and should therefore be denied.

Two United States Supreme Court cases establish "hot pursuit" as a limited exception to the warrant requirement of the Fourth Amendment, *Warden v. Hayden*, supra., and *U.S. v. Santana* supra. However, neither of these decisions establish hot pursuit as a broad exception unto itself, but rather as a very limited reason for the police to enter a house to try to prevent something serious and undesirable from happening, e.g., flight by a defendant, injury to others, or destruction of evidence.

In *Warden*, it was found significant that "the police were informed an armed robbery had taken place and that the suspect had entered (the residence) less than five minutes before they reached it." 387 U.S. at 298. Therefore, both flight and injury to the police or innocent members of the public were strong possibilities even after defendant had entered his home.

In *Santana*, the police officers' warrantless search of a private dwelling was justified not only by the "hot pursuit" of a known distributor of heroin, but also by the potential for destruction of evidence (packets of heroin and marked bills) that could have obviously followed had the police waited for a warrant to arrive before entering defendant's home.

Despite petitioner's claim to the contrary, the present case is more factually aligned with *Welsh v. Wisconsin* 466 U.S. 740 (1984) and is readily distinguishable from the above cases for a number of reasons. While "hot pursuit" certainly had been established when Patrolman Liss activated his overhead lights and began to pursue respondent, there was no

other exigency combined with the hot pursuit to justify Liss entering the house. In other words, there was no possibility of flight[3] nor was there a danger to the public or the officer once Bolte was in his home.[4]

It is also notable that the mere possibility that Bolte had an intoxicating amount of liquor in his system which would slowly dissipate over time does not establish an "imminent destruction of evidence" exigency sufficient to justify warrantless entry into a house for three very basic reasons: 1) the only offenses for which Liss had probable cause to arrest at the time of the entry into the house and as conceded by the State in their argument before the Appellate Division, were the non-drunk-driving offenses of reckless driving, eluding, etc.; 2) *Welsh* firmly establishes that except in the instance of very serious crimes "a warrantless home arrest cannot be upheld simply because evidence of petitioner's blood alcohol might have dissipated while the police obtained a warrant," 466 U.S at 54; and finally 3) the trial court correctly noted there were "at least five judges that live within 2 minutes of that . . . [residence]" so that a warrant

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[3] Patrolman Liss was at the respondent's residence and other officers were "by then at or near the scene." State v. Bolte 225 N.J. Super. 335, 341 (App. Div. 1988) and see Pet. App. D at pp.27a.

[4] Significantly, the New Jersey Supreme Court in Bolte found that "they may claim no similar danger to either the police or the public, particularly *after* Bolte entered his home. There was no indication at that point that Bolte posed a danger to anyone and nothing in the records suggests that Bolte was prepared to leave the house to resume his erratic driving behavior." *State v. Bolte*, 115 N.J. at 593, Pet. App. F at pp. 46a.

could have been quickly obtained either in person or by telephone. (Pet. App. A at pp. 9a.)

Petitioner suggests that Officer Liss was without timely recourse in the absence of an ability to proceed into the respondent's residence without a warrant, and therefore hot pursuit, safety considerations and dissipation of evidence justify the officer's actions. However problematic this appears upon first glance, the legal and constitutional remedy was right at the officer's fingertips, if he wished to utilize it. New Jersey, in recognizing that exigent circumstances should rarely prevail over the need for a written warrant, enacted in the Rules Governing the Courts of the State of New Jersey, and in the Rules Governing Criminal Practice, Court Rule 3:5-3 which provides in part (b) that

> A Superior Court Judge may issue a search warrant upon sworn oral testimony of an applicant who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic surveillance. . . . A warrant may issue if the judge is satisfied that *exigent circumstances* exist sufficient to excuse the failure to obtain a written warrant and that *sufficient grounds* for granting the application have been shown. (Emphasis added.).

Officer Liss was well aware of that alternative, and further aware that there is an emergent judge on call to respond to this type of situation 24 hours a day in Burlington County. Had he taken the several minutes needed to apply for a search warrant by oral

application, his actions would have been cloaked in a presumption of validity, rather than unreasonableness. Indeed, that would have been the most prudent action, considering the valuable and sacred rights afforded by the Fourth Amendment. As the New Jersey Supreme Court noted in *Bolte*, " . . . . less intrusive measures should be used whenever possible. . . . " 115 N.J. 598.

Petitioner urges that the utilization of a major/minor offense distinction to govern the legitimacy of warrantless in-home arrests following hot pursuit is both unwise and unworkable. In support of this claim, petitioner cites a number of decisions from other state jurisdictions which have not acknowledged the major/minor offense distinction. While respondent disputes that claim, suffice it to say that each and every one of those decisions are distinguishable on their facts from the case sub judice. Numerous jurisdictions, have in fact, followed the major/minor offense distinction. See *State v. Ramirez* ___ Wash. App. ___, 746 P.2d 344(1987); *State v. Hert* 220 Neb. 447, 370 *N.W.* 2d 166 (1985); *State v. Peters* 695 *S.W.* 2d 140 (Mo. App. 1985); *People v. Strelow* 96 *Mich. App.* 182 (1980); *Dorman v. U.S.* 435 *F.*2d 385 (D.C. Cir. 1970); *People v. Klimeck*, 427 *N.E.* 2d 598 (Ill. Dist. Ct. App. 1981); *State v. Storvick*, 423 *N.W.* 2d 398 (Minn. Ct. App. 1988); *People v. Day* 519 *N.E.* 2d 115 (Ill. App. Ct.), *rev. denied* 526 *N.E.* 2d 834 (1988); *McCall v. People* 623 *P.*2d 397 (Colo., 1981); *City of Seattle v. Altschuler* 766 *P.*2d 518 (Wash. Ct. App. 1989) (the mere fact that defendant did not stop his car, without more, does not satisfy the exigent circumstance requirement that would allow government agents to invade the sanctity of the home. Id. at 520.) *State v. Guertin*

190 *Conn.* 440, 461 A.2d. 963, (1983); *State v. Krause* 163 *Conn.* 76, 301 A.2d 324 (1971).[5]

By requesting this Court to abandon the major/minor offense distinction, petitioner would have this Court reverse a long line of decisions which have carefully evolved over time. Petitioner seeks this Court to disregard the mandates of *Payton v. New York* 445 U.S. 573 (1980)[6] *Warden v. Hayden* supra., *U.S. v. Santana* supra., and *Welsh v. Wisconsin* supra., when in fact these cases carefully delineate the parameters as to when warrantless searches may be made.

The reasoning of *Welsh* is compelling. Before government agents may invade the sanctity of the home, the government must demonstrate exigent circum-

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[5] Petitioner quotes at length from *State v. Blake* 468 N.E.2nd 548 (Ind. App. 1984) and *Gasset v. State* 497 So.2d 97 (Fla. App.) *rev. denied* 500 So.2d 544 (1986) in support of the trial judge's theory in denying the motion to suppress. The fatal flaw with this theory is that the trial judge has been reversed in unanimous decisions by both the Appellate Division and the New Jersey Supreme Court. Further, *Gasset*, while factually similar to the instant matter, is completely inapplicable because of its "fatal" mistake of relying solely on the decision in *Blake*, which in turn refused to heed the *Welsh* Court's instruction that the "single most important factor" was the seriousness of the underlying offense. *Blake* and *Gasset* have chosen to ignore the constitutionally-based holding in *Welsh* and instead, rely on the dissent, i.e., what they wished the law were instead of what it really is. Such flagrant disregard of United States Supreme Court decisions should not now serve as the foundation upon which new law is built.

[6] The Fourth Amendment prohibits the police from making a warrantless, non-consentual entry into a suspects home in order to make a routine, non-exigent *felony* arrest.

stances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. When the government's interest is only to arrest for a minor offense, the presumption of unreasonableness is difficult to rebut. . . . 466 U.S. at 750. Even Justice White's dissent in *Welsh* ackowledged that "the gravity of the underlying offense is, I concede, a factor to be considered. . . . . " Id. at 759.[7]

It is clear that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *U.S. v. U.S. District Court* 407 U.S. 297 (1972), and that exceptions to the warrant requirement are "few in number and carefully delineated," *U.S.D.C.* at 318.

While petitioner seeks this Court to modify or abandon the major/minor distinction, one court, in *Dorman v. U.S.* 435 *F.*2d 385, 392-393 (D.C. Cir. 1970) noted that there are seven major factors which a court should consider in evaluating a warrantless arrest in a home: 1) if a *grave* offense (i.e. serious felony) is involved; 2) if the suspect is armed; 3) whether there is a *clear* showing of probable cause (established before entry) that the suspect committed the crime; 4) if there is a strong reason to believe that the suspect is in the premises; 5) the likelihood of escape; 6) the likelihood that entry will be peaceable; and 7) whether the entry is made at night. Of these factors, only #4

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[7] As mentioned in *Welsh*, 466 U.S. at 750 fn. 12, "even the dissentors in *Payton*, ... recognized the importance of the felony limitation on such arrests."

favors a warrantless entry in this case, and of the seven factors #4 was clearly the easiest to satisfy. It therefore seems impossible to justify sufficiently, Liss' entry into respondent's home.

The Court in *Dorman* appeared to be adopting a totality of the circumstances test, a position now urged by the petitioner. However, even if this Court were to adopt such a test based on *Dorman* or similar factors, the New Jersey Supreme Court's decision would still be the same, i.e., the factors clearly weigh in favor of requiring the officers to obtain a written warrant based on the hot pursuit of one who had committed only minor offenses.

In *Chimel v. California*, 395 U.S. 752, 761 (1969) the Supreme Court stated that "the presence of a search warrant serves a high function. Absent some *grave emergency*, the Fourth Amendment has interposed a magistrate between the citizen and the police." Again, the clear distinction between major and minor offenses is a theme that carries throughout Fourth Amendment analysis. Officer Liss' actions were not in response to a grave emergency, but to a set of circumstances which were clearly under control once at the respondent's home.

As the court in *People v. Strelow*, 96 Mich. App. 182, 190-191, 292 *N.W.* 2d 517, 521 (1980) observed

> the hot pursuit doctrine excuses strict adherence to statutory notice and demand mandates in order to prevent police from being unduly burdened in their efforts to arrest criminals *guilty of serious offenses*. Preventing the escape of a *fleeing felon* may necessarily prevail over the interests the statute

> was designed to protect. Employing the same balancing test, *the less serious nature of a misdemeanor offense militates against extending the hot pursuit exception to justify unannounced entry into a private residence to make such an arrest.* Important interests such as privacy expectations and prevention of unnecessary violence must, in this instance, prevail. *Id.* (Emphasis added)

While petitioner attempts on one hand to convince the Court of the unworkability of the major/minor offense distinction, they nevertheless attempt on the other hand to show that the offenses committed by respondent were indeed serious. They allege that respondent committed the following offenses and was exposed to the following custodial exposures: eluding a police officer (N.J.S.A. 2C:29-2b) - 6 months; reckless driving (N.J.S.A. 39:4-96) - 60 days; driving while intoxicated (N.J.S.A. 39:4-50) - 30 days; speeding (N.J.S.A. 39:4-99) - 15 days; failure to maintain a single lane (N.J.S.A. 39:4-88b) - 15 days; disorderly conduct (N.J.S.A. 2C:33-2a) - 30 days.

What petitioner fails to mention is that the most serious offenses in terms of their custodial exposures are unaffected by any suppression ruling made by this Court or any state court. Clearly, the eluding charge (N.J.S.A. 2C:29-2b) carrying a potential of six (6) months incarceration, as well as the reckless driving charge (N.J.S.A. 39:4-96) carrying a potential for 60 days incarceration, can still be prosecuted based on the observations of Office Liss prior to his warrantless entry of respondent's home. Similarly, the same result can be reached with the charges of speeding, failure to maintain a single lane, and arguably the

disorderly conduct charge. Further, *none* of the offenses cited to by petitioner are crimes under New Jersey law and are at most, disorderly persons or traffic offenses. N.J.S.A. 2C:1-4.

Petitioner attempts to equate drunk driving with being a "serious" offense thus elevating respondent's conduct to the class of offenses which may bypass the Fourth Amendment warrant requirement. Petitioner ignores the fact that a drunk driving charge is a non-criminal offense and is contained in Title 39 of the New Jersey Statutes dealing with traffic offenses. Although a convicted defendant may be incarcerated for 30 days for a first offense, the penalties are more similar to those in *Welsh*. A person convicted in New Jersey as a first time offender for DWI under N.J.S.A. 39:4-50, can be sentenced to, at most, a $400.00 fine, 1 year revocation of driving privileges and a 30 day incarceration.

There is no doubt that drunk driving is the target of national scorn. But the public's opinion of the gravity of certain illegal behavior does not mean that the offense is automatically "serious" for purposes of Fourth Amendment analysis.

Petitioner cites *State v. Wren*, 115 Idaho 618, 768 P.2d 1351 (1989) for the proposition that "an arrest occurs when it is communicated, not when the officer decides to take such action," (see petitioner's brief, p.12), and suggests that respondent herein was under lawful arrest. Interestingly, the *Wren* decision, cited by petitioner, cites *State v. Bolte*, 542 *A*.2d 494 (App. Div. 1988) in support of their holding where they, "join those courts which held that a warrantless arrest in the home must be justified upon an exigent

circumstance in addition to the pursuit.[8]" Petitioner's reasoning is defective and ignores the dictates of *Brower v. County of Inyo* 109 S.Ct. 1378, (1989) which proclaims that

> It is clear. . . . , that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement. . . . nor even when there is governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of movement through means intentionally applied. *Id.* at 1381.

Merely trying to arrest someone is not itself an arrest. An individual such as respondent would have nothing to gain by fleeing if the arresting officer would have only obtained a warrant before entering defendant's house. Contrary to petitioner's argument, an affirmance of the New Jersey Supreme Court's decision would not encourage flight. It would merely require the police to respect the Fourth Amendment.

In *Johnson v. U.S.* 333 U.S. 10 (1948), the Supreme Court found no sufficient reasons for dispensing with a warrant where there was no risk of imminent harm to any person, no evidence was being destroyed or

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[8] Also citing, *Jeffcoat v. Hinson*, N. 87-1733, unpublished decision (4th Cir. 1988); *McCall v. People* 623 P. 2d 397 (Colo. 1981); *People v. Day* 519 *N.E.* 2d 115 (Ill. App. Ct. 1981); *People v. Klimeck* 427 *N.E.* 2d 598 (Ill. Dist. Ct. App. 1981); *People v. Strelow* 292 *N.W.* 2d 517 (Mich. Ct. App. 1980); *State v. Storvick* 423 *N.W.* 2d 398 (Minn. Ct. App. 1988).

likely to be destroyed, and the suspect was not likely to flee while the police obtained a warrant.

In *McDonald v. U.S.* 335 U.S. 451 (1948) the Supreme Court made a similar determination, explaining that inconvenience to the police, occasioned by delay in obtaining a warrant, was not an adequate reason to make a warrantless entry.

In *U.S v. Jeffers* 342 U.S. 48 (1951), the Supreme Court again invalidated a warrantless entry noting that "there was no question of violence, no moveable vehicle (object) was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized." *Id.* at 52.

As the Supreme Court declared in *Boyd v. U.S.* 116 U.S. 616, 635 (1886) and reiterated in *Silverman v. U.S.* 365 U.S. 505, 81 S. Ct. 679 (1961), "It may be that it [an illegal search/seizure] is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." Of the two competing evils sought to be avoided, clearly, the public interest in protecting the Fourth Amendment substantially outweighs the State's interest in making warrantless arrests for minor offenses inside a persons residence.

CONCLUSION

The New Jersey Supreme Court's decision represents a well-reasoned application of the relevant case law to the facts of this case. Their holding was premised on the sound conclusion that "hot pursuit alone is insufficient justification for the warrantless arrest

in *this* case" (Pet. App. F at pp. 45a). It is consistent with prior United States Supreme Court decisions regarding this issue, and after a logical analysis, fails to find any of the exigent circumstances needed to circumvent the Fourth Amendment, namely, the failure of the State to prove a danger to the officers or the public, the possibility of destruction of evidence, or the danger of flight. Indeed, the New Jersey Supreme Court determined that the offenses respondent was charged with were "minor" under New Jersey law. United States Supreme Court precedent has already clearly been established and provides more than ample guidance to lower courts in addressing this issue. Further, it appears that the United States Supreme Court, in so clearly defining the boundaries of warrantless in-home arrests, has deferred to individual states to decide this issue based on state law. Therefore, the petitioner's writ should be denied.

Respectfully submitted,

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